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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM 1930

No. 98

ARIZONA GROCERY COMPANY, A CORPORATION,
Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION, BAY TRANSPORT COMPANY, A CORPORATION, AND SOUTHERN PACIFIC COMPANY, A CORPORATION,
Respondents,

AND

ARIZONA GROCERY COMPANY, A CORPORATION,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION, AND SANTA MARIA VALLEY RAILROAD COMPANY, A CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

SAMUEL WHITE,
Counsel for Petitioner.

FRED J. ELLIOTT,
FRANK L. SNELL, JR.,
Of Counsel.

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Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Arizona Grocery Company, respectfully prays for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit entered in that certain cause entitled The

Atchison, Topeka & Santa Fe Railway Company, et al., Defendants and Appellants, vs. Arizona Grocery Company, Plaintiff and Appellee, and Southern Pacific Company, et al., Defendants and Appellants, vs. Arizona Grocery Company, Plaintiff and Appellee, which decree was entered on the 23rd day of March, 1931 (R. 438-462), and in support thereof respectfully shows:

I

SUMMARY STATEMENT OF THE MATTER INVOLVED

The present case is one arising under the Federal Transportation Act. The question involved turns upon the construction and interpretation of portions of this Act and involves the constitutionality thereof. The facts are as follows:

The Interstate Commerce Commission on the 11th day of March, 1929, granted your petitioner an order of reparation against the respondent carriers (R. 321-323). This order was made in conformity with the findings and opinion of the Interstate Commerce Commission, in which the Commission found that the respondent carriers had charged the petitioner and others unreasonable rates on sugar moving into Phoenix, Arizona, from various points in California (copy of Commission's opinion, R. 290-319).

The respondent carriers refused to comply with the order of the Interstate Commerce Commission (R. 262). Two actions were duly filed by your petitioner in the United States District Court for Arizona against the respondent carriers, based upon this order of the Interstate Commerce Commission and in conformity with Section

16 (2) of the Transportation Act, *49 U. S. C. A., Section 16 (2)*, (R. 2-8; 48-54). The cases were tried by the court, sitting without a jury. There was practically no issue of fact, the matter having been submitted to the court on an Agreed Statement of Facts (R. 254-319). The District Court sustained the order of the Interstate Commerce Commission and ordered judgments in accordance therewith and in favor of your petitioner (R. 225, 228). From these judgments the respondent carriers prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit. The two cases were presented to the Appellate Court on a consolidated record and treated as one case. The Appellate Court reversed the judgments of the trial court and found the order of the Interstate Commerce Commission to be invalid (R. 438-462; 464).

The Agreed Statement of Facts upon which the cases were submitted to the trial court sets forth the following essential facts: On June 22, 1921 the Interstate Commerce Commission prescribed the maximum rates on sugar from various California points to Phoenix, Arizona, which maximum rate became effective on September 17, 1921 (R. 263-275). On November 3, 1922 the reasonableness of the rates on sugar charged by the respondent carriers from California points to Phoenix, Arizona was challenged by various Phoenix shippers in a complaint filed before the Interstate Commerce Commission, as provided in Section 13 of the Transportation Act (R. 277). This complaint was later consolidated with other similar complaints (R. 290). These were not finally determined until March 12, 1928, at which time the Interstate Commerce Commission found that the respondent carriers had in fact charged Phoenix shippers (including your

petitioner) unreasonable rates and that such shippers had been damaged in the amount of the difference between the charges paid and those which would have accrued at the rates therein found to have been reasonable (R. 290-309). In conformity with these findings, the Interstate Commerce Commission made its order of reparation in favor of your petitioner and against the respondent carriers (R. 46, 47). Similar orders were made on behalf of other shippers. The shipments of your petitioner upon which reparation was allowed were transported between February 21, 1923 and February 10, 1925, and were made at rates equal to or less than the maximum rate previously approved by the Interstate Commerce Commission on June 22, 1921 and effective on September 17, 1921 (R. 442). Such shipments were made subsequent to November 3, 1922, the date upon which a complaint was filed by Phoenix shippers challenging the reasonableness of such rates (R. 443).

The respondent carriers, in briefs and arguments in the District Court and in the Circuit Court of Appeals, contended that the reparation order in question is invalid, and their grounds for such invalidity may be summarized as follows:

1. The charges assessed upon plaintiff's shipments involved accrued under rates which were conclusively just and reasonable, and in conformity with the requirements of the Interstate Commerce Act, at the times the shipments moved.

(a) The rates successively in effect and applicable upon said shipments were published and assessed by the defendants in conformity with a continuing and effective order of the Commission.

(b) Rates published and assessed in compliance with a continuing valid order of the Commission are thereby conclusively established as just and reasonable rates, and cannot, in legal contemplation, be "unreasonable in fact."

2. The Interstate Commerce Act does not purport to confer jurisdiction upon the Commission to award reparation against rates approved or prescribed by the Commission, or against rates which are less in amount than rates so approved or prescribed.

(a) The Act authorized the Commission to award damages to a private party only when he suffers legal damage because of the violation of the Act by a carrier subject thereto.

(b) The publication and assessment of rates in conformity with a continuing valid order prescribing maximum reasonable rates cannot be a violation of the Act, and therefore cannot give rise to legal damages.

3. If the Interstate Commerce Act is so construed as to confer jurisdiction upon the Commission to order reparation against Commission-made rates, it is to that extent unconstitutional and void, and any orders of the Commission issued in purported exercise of such unconstitutional provisions of the Act are likewise void, in that the enforcement of the Commission's order would deprive the defendants of property without due process of law, and would therefore contravene the Fifth Amendment to the Federal Constitution.

On the other hand, your petitioner's contentions sustaining the validity of the order may be summarized as follows:

1. Section 15 (1) *49 U. S. C. A., Sec. 15 (1)*, confers upon the Interstate Commerce Commission the power to

prescribe just and reasonable rates, or the maximum or minimum, or maximum and minimum rates, to be charged by carriers subject to the Act.

2. The rate prescribed by the Commission's order in *Traffic Bureau of Phoenix Chamber of Commerce, et al., vs. Atchison, Topeka and Santa Fe Railway Company, et al., 95 I. C. C. 146,* (R. 166-180) was a maximum rate. Under this order, the carriers still possessed the discretionary power to voluntarily charge lesser rates.

3. Section 1 (4 and 5) of the Interstate Commerce Act, *49 U. S. C. A., Sec. 1 (4 and 5),* requires the carriers to maintain reasonable rates. This places upon the carriers the duty of charging reasonable rates, and such duty is not removed by the approval of a maximum rate by the Interstate Commerce Commission.

4. Under the Transportation Act every unjust and unreasonable rate is prohibited and declared to be unlawful. A shipper has a property right in and to a reasonable rate.

5. Section 8 of the Transportation Act, *49 U. S. C. A., Sec. 8,* provides that in case any common carrier shall commit any unlawful act or omit anything required to be done by the Interstate Commerce Act, it shall be liable to the shipper injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of said Act.

6. Section 9 of the Transportation Act, *49 U. S. C. A., Sec. 9,* grants to any shipper claiming to be damaged by any common carrier the right either to make complaint to the Interstate Commerce Commission or to bring suit in a District Court of the United States of competent jurisdiction.

7. Section 13 of the Transportation Act, *49 U. S. C. A., Sec. 13,* grants to the Interstate Commerce Commission the power and jurisdiction to investigate such complaints as may be filed under Section 9, supra.

8. Section 16 (1) of the Transportation Act, *49 U. S. C. A., Sec. 16 (1),* confers upon the Commission the quasi-judicial power and jurisdiction to grant awards of reparation for violations of the Transportation Act and to make such necessary orders as may be required directing the carrier to pay to the complainant such sums to which he may be entitled on or before a day named.

9. These provisions of the Transportation Act conferred upon the Commission the necessary power and jurisdiction to make the order of reparation in question, and such order was therefore valid and binding upon the respondent carriers.

10. The petitioner was entitled to reasonable rates and the respondent carriers were only entitled to charge reasonable rates. Therefore returning to the petitioner any excess over a reasonable rate did not amount to taking property of the respondent carriers without due process of law, and the provisions of the Transportation Act, permitting the payment of such reparation, are not contrary to the Fifth Amendment to the Constitution.

II

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The matter of the right and power of the Interstate Commerce Commission to award reparation to a shipper when it finds that such shipper has paid rates which were unreasonable, whether such rates were equal to or less

than a previously approved maximum rate, involves an important question of federal law which has not been, but should be, settled by this Honorable Court.

2. The decision of the Circuit Court of Appeals, holding that the Interstate Commerce Commission, under the Transportation Act, did not have authority to award reparation to your petitioner in the present case, involves an important question of federal law which has not been, but should be, settled by this Honorable Court.

3. The questions here presented are of real substance, involving the construction and application of the Transportation Act, a statute of the United States.

4. Unless this Honorable Court takes this case for a review upon this petition for writ of certiorari, the petitioner and other shippers similarly affected will be denied their property, to which they are entitled under the Transportation Act, without due process of law.

5. The decision of the Circuit Court of Appeals in the instant case, holding that the Interstate Commerce Commission, acting in its quasi-judicial capacity, did not have authority to award reparation to your petitioner, is a decision of a federal question in a way probably in conflict with applicable decisions of this Honorable Court.

6. Respondent carriers have admitted that the issues presented are of outstanding importance to all shippers and carriers generally.

7. Because of the importance to the business world and the legal profession of the statute involved, there is need of an authoritative decision as to the power of the Interstate Commerce Commission in such cases.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Honorable Court to the Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this Honorable Court a full and complete transcript of the record and of the proceedings of said Circuit Court had in the case numbered and entitled on its docket, No. 6284, The Atchison, Topeka & Santa Fe Railway Company, et al., Defendants and Appellants, vs. Arizona Grocery Company, Plaintiff and Appellee, and Southern Pacific Company, et al., Defendants and Appellants, vs. Arizona Grocery Company, Plaintiff and Appellee, to the end that this cause may be reviewed and determined by this Honorable Court, as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Ninth Circuit be reversed by this Honorable Court, and for such further relief as to this Honorable Court may seem proper.

DATED this 12th day of May, 1931.

SAMUEL WHITE,
Counsel for Petitioner.

FRED J. ELLIOTT,
FRANK L. SNELL, JR.,
Of Counsel.

Supreme Court of the United States

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SOUTHERN PACIFIC COMPANY, A CORPORATION, ET AL.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinion of the Court Below

The opinion of the Circuit Court of Appeals for the Ninth Circuit in the instant case has not yet been reported. The opinion was filed March 23, 1931 (R. 438-462).

II.

Jurisdiction

1. The date of the judgment to be reviewed is March 23, 1931 (R. 462).

2. This review is sought under the provisions of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, *28 U. S. C. A., Sec. 347.*

3. The present case is a civil one heard and determined in the Circuit Court of Appeals for the Ninth Circuit upon appeal from the District Court of the United States for the District of Arizona, and involves the construction, application and interpretation of the Interstate Commerce Act, a Federal statute (R. 438). The application for and the allowance of the writ is sanctioned by the decisions of this Honorable Court in a number of cases, like the present, involving the construction and interpretation of the Interstate Commerce Act.

4. Among the decisions authorizing the writ to review decisions of Circuit Courts of Appeals, involving an interpretation and application of the Interstate Commerce Act and particularly as to questions of reparation orders, see:

Southern Pacific Co. vs. Darnell-Taenzer Lumber Co., 245 U. S. 531;
A., T. & S. F. Ry. Co. vs. Spiller, 253 U. S. 117;
Meeker vs. Lehigh Valley R. R. Co., 236 U. S. 412.

III.

Statement of the Case

This has already been stated in the preceding petition, under Paragraph I, which is hereby adopted and made a part of this brief.

IV.

Specification of Errors

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the order of the Interstate Commerce Commission, awarding reparation to your petitioner, was invalid.

2. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the Transportation Act does not confer jurisdiction upon the Interstate Commerce Commission to award reparation to your petitioner.

3. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the Transportation Act is unconstitutional and void insofar as it confers jurisdiction upon the Interstate Commerce Commission to award reparation to your petitioner.

4. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the Interstate Commerce Commission does not have jurisdiction, acting in its quasi-judicial capacity, to award reparation to a shipper after finding that the rate charged the shipper was unreasonable, even though such rate was equal to or less than a maximum rate previously approved by the Interstate Commerce Commission.

5. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the defendant carriers had not violated the Transportation Act.

6. The Circuit Court of Appeals for the Ninth Circuit erred in holding that your petitioner did not pay unreasonable rates and charges for the transportation of its goods during the period for which reparation was allowed by the Interstate Commerce Commission.

7. The Circuit Court of Appeals for the Ninth Circuit erred in reversing the decree of the District Court for the District of Arizona.

V.

Summary of the Argument

Point A. The present question is an important one of federal law which has not been, but should be, settled by this Honorable Court.

Point B. Unless this Honorable Court takes this case for review upon this petition for writ of certiorari, the petitioner will be denied its property, to which it is entitled under the Interstate Commerce Act, without due process of law.

Point C. The opinion and decision of the Circuit Court of Appeals in the present case is in a way probably in conflict with the decisions of this Honorable Court.

Point D. In other cases involving the validity of reparation orders, this Honorable Court has granted writs of certiorari.

ARGUMENT

Point A.

The present question is an important one of federal law which has not been, but should be, settled by this Honorable Court.

It is admitted by all parties concerned in the present matter that the question involved is an important one of federal law which has not been settled by this Honorable Court. Your petitioner cannot improve upon the lan-

guage used by the respondents in their brief submitted to the United States Circuit Court of Appeals for the Ninth Circuit, which referred to the importance of this question as follows:

> "The issues presented by these appeals are of outstanding importance, not merely to the parties to the causes, but to all shippers and carriers generally. Issues pertaining to the Commission's jurisdiction under the Interstate Commerce Act are of tremendous interest to every common carrier engaged in interstate commerce, and to every person who uses the carriers' facilities."

Continuing from the respondents' brief before the lower Appellate Court, showing the fact that the present question has not been settled by this Honorable Court:

> "So far as we are able to learn, the instant case is the first in which a Federal Appellate Court has been called upon to determine whether the Interstate Commerce Commission may validly award reparation against rates published and maintained in conformity with its valid continuing formal order prescribing the reasonable maximum rate thereafter to be charged."

The respondent carriers therefore agree with the petitioner that the present question is an important one to shippers and carriers generally and that it has not been settled by this Honorable Court. The scope of the Interstate Commerce Act and its administration by the Commission make questions like the present one of extreme importance to shippers and carriers.

The Interstate Commerce Commission has always insisted that it possessed the power and jurisdiction to

award reparation in such cases as the present one. There are three recent opinions of the Commission sustaining this position.* In each of these three cases orders of reparation were made to numerous claimants. Your petitioner is advised, and states as information for the benefit of this Honorable Court, that the carriers have resisted the payment of all of these reparation orders, and that same are pending in various federal and state courts. In many of these cases counsel have stipulated that further proceedings be held in abeyance until the final determination of the instant case, for the reason that the same question is involved. The determination of the present case by this Honorable Court will settle this question so that shippers, carriers and the Interstate Commerce Commission will know whether or not the Commission possesses the jurisdictional power to award reparation in such cases. As time goes on, a larger percentage of the rates of the carriers will be prescribed or approved by the Interstate Commerce Commission and the present question will become, therefore, even more important in the future. For this reason there should be a determination by this Honorable Court as to whether the Commission is without power to allow reparation to a shipper who has paid an unreasonable rate simply because such rate has been previously approved or prescribed by the Commission, in the fixing of a maximum rate.

*_Traffic Bureau of Phoenix Chamber of Commerce, et al., vs. Atchison, Topeka & Santa Fe Railway Company, et al._, 140 I. C. C. 171;

Eagle Cotton Oil Company vs. Southern Railway Company, et al., 140 I. C. C. 131;

Arizona Corporation Commission, et al., vs. A., T. & S. F. Ry. Co., 156 I. C. C. 418.

While it is not the office of this brief in support of the petition for the writ of certiorari to argue the incorrectness of the opinion of the Circuit Court of Appeals, your petitioner believes it would not be amiss to point out that under the decision of the Circuit Court of Appeals in the present case no reparation can be allowed a shipper by the Commission in the future, regardless of how unjust and unreasonable the rates paid by the shipper may be, if such rates had been previously approved or prescribed by the Commission in the fixing of a maximum rate. Your petitioner therefore urges that the present question is of extreme importance to the shippers of the United States and should therefore be determined by this Honorable Court, in order that such shippers may be aware of their rights under the Interstate Commerce Act as it now reads.

The present status of the matter is that the Interstate Commerce Commission maintains that it possesses the power and jurisdiction to award reparation to shippers in such cases, if in fact they have paid an unreasonable rate (R. 306, 307). The Circuit Court of Appeals for the Ninth Circuit has held in the present case that the Commission does not possess this power (R. 451). Your petitioner therefore feels that because of this condition and its general importance to carriers and shippers, and because the question involves an important one of federal law, this Honorable Court should determine and settle the matter.

Point B.

Unless this Honorable Court takes this case for review upon this petition for writ of certiorari, the petitioner will be denied its property, to which it is entitled under the Interstate Commerce Act, without due process of law.

It is the contention of shippers, which contention is not denied by the carriers, that they are entitled to reasonable rates. This Honorable Court has stated that the right to reasonable rates is a property right. *Pennsylvania R. Co. vs. Puritan Coal Min. Co., 237 U. S. 120, 130.* The Interstate Commerce Act specifically preserved and protected this property right and gave to shippers a method of protecting this right in case they were charged unjust and unreasonable rates, *49 U. S. C. A., Secs. 13 (1) and 16 (1 and 2).* The fundamental purpose of the Transportation Act was to prevent unjust and unreasonable rates. *New York, N. H. and H. R. Co. vs. Interstate Commerce Commission, 200 U. S. 361.*

The purpose of the Transportation Act was also to establish a tribunal to determine the relation of communities, shippers and carriers, and to fix their respective rights and obligations. *U. S. vs. Pacific and A. R. and Nav. Co., 228 U. S. 87.*

In the present case the Interstate Commerce Commission found that the petitioner was charged an unreasonable rate (R. 34, 46, 47). No evidence to contradict this finding was introduced by the respondents at any stage of the proceedings. It therefore follows that unless the judgment of the Circuit Court of Appeals in the present case is reversed your petitioner will have paid unreasonable rates to the respondents and will therefore have been deprived of property without due process of law and in contravention of the intent and purposes of the Interstate Commerce Act.

The opinion and decision of the Circuit Court of Appeals in the instant case admits that under its construction of the Interstate Commerce Act it is possible that

your petitioner might have been charged unreasonable rates, even though such rates charged were equal to or less than a maximum rate approved by the Commission (R. 451). This opinion holds that the shipper affected by such unreasonable rates might ask for the establishment of a new rate, but that there is no reason why an allowance of reparation should be made for the past (R. 451). Such a construction results in a clear-cut violation of the Act and of its intent and purposes, as expressed in *Section 1 (4 and 5)*. It denies the petitioner the reparation allowed by the Commission and amounts to taking its property without due process of law.

Point C.

The opinion and decision of the Circuit Court of Appeals in the present case is in a way probably in conflict with the decisions of this Honorable Court.

Your petitioner believes that the opinion of the Circuit Court of Appeals for the Ninth Circuit is in a way probably in conflict with a decision of this Honorable Court. This was impliedly admitted in the opinion, as shown by the following statement:

> "There are statements in the opinion of the Supreme Court, in Reagan vs. Farmers L. & T. Co., 154 U. S. 362, 367, that militate against the views herein expressed." (R. 458).

The decision of this court, in the case cited, considered phases of the present question, commenting:

> "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative, rather that a judicial, function. *Yet it has always been*

recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter, and to award to the shipper any amount exacted from him in excess of a reasonable rate, and also, in a reverse case, to render judgment in favor of the carrier for the amount found to be a reasonable charge. *The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature, instead of the carrier, prescribes the rates.* The courts are not authorized to revise or change the body of rates *imposed* by a legislature or *a commission.* They do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable, as between the carriers and the shippers. They do not engage in any mere administrative work. *But still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable,* and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation." (Emphasis supplied.)

The importance of this holding is apparent when it is recalled that the Interstate Commerce Commission, in granting reparation, acts in the nature of a court and possesses quasi-judicial powers. *Baer Bros. vs. D. and R. G. R. Co., 233 U. S. 479.* Your petitioner therefore feels that the decision and opinion of the Ninth Circuit in the present case is contrary to the decision of *Reagan vs. Farmers L. and T. Co., supra,* and for this reason the decision in the present case should be reviewed by this Honorable Court.

Point D.

In other cases involving the validity of reparation orders, this Honorable Court has granted writs of certiorari.

The question of the validity of reparation orders has been before this Honorable Court numerous times. The Court has stated that a writ of certiorari is the proper method by which to review decisions of Circuit Courts of Appeals affecting such reparation orders.

> "An objection is taken to the jurisdiction of this Court upon writ of error. An application is made for a certiorari in case the objection is held good, and as we should grant the latter writ in that event the question has no importance here except as a precedent."
>
> *Southern Pacific Co. vs. Darnell-Taenzer Lumber Co.*, 245 U. S. 531.

Writs have been allowed in similar cases of reparation orders, as shown in the following:

A., T. & S. F. Ry. Co. vs. Spiller, 253 U. S. 117;
Meeker vs. Lehigh Valley R. R. Co., 236 U. S.

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, and that to such an end a writ of certiorari should be granted and that this Honorable Court should review the decision of the Circuit Court of Appeals for the Ninth Circuit and finally reverse it.

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